SUPREME COURT, U. S.

JUL 7 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 76

JAMES T. BENN, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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July 7, 1967

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Commissioner's brief asserts (p. 2) that the Tax Court found that petitioner had no intention of ever honoring any of the promissory notes involved in the cost computation and that the notes were not in fact

paid prior to the Tax Court trial.[1] The Commissioner would thus seek to avoid a resolution of the first question presented in the Petition—whether the delivery of valid and binding promissory notes must be considered as part of the cost of acquiring real property.

But the Commissioner's broad assertion is so belied by the findings of the Tax Court and the record of the proceedings as to render the question most appropriate for consideration. While the Tax Court did say (Pet., p. 4a) that petitioner had no intention of honoring "certain" of the notes and that there appeared to be little likelihood that he would ever pay those "certain" notes, the Tax Court did concede in its findings of fact that many of the other notes involved in this computation were in fact paid. Thus, in speaking of the $65,764.40 spent by the petitioner in acquiring and constructing a motel in Miami, the Tax Court found (R. 2065) that "most of . . . [this] money was borrowed by petitioner from a number of people. Most of the borrowed money [represented by some of the notes in issue] was repaid, although some of the money repaid was later borrowed [after the tax years in question] by petitioner for other purposes."

The record conclusively demonstrates, moreover, that the notes, other than the "certain" ones mentioned

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[1] In summarizing the Tax Court's conclusions, the Commissioner mistakenly states (Br., p. 2) that the court found that "petitioner took steps to impede the collection of the notes he had given in purchasing these properties and that he had no intention of ever honoring his notes." Actually, the court found (Pet., p. 4a) only that "he affirmatively took steps to impede the collection of his obligations and that he had no intention of honoring *certain* of the promissory notes for which he acquired property at their maturity or at any other time." [Emphasis added.]

but not identified in the Tax Court opinion, were in fact paid prior to the trial in 1960. These notes were:

1. The Viglianco note of $27,300, which was marked paid and cancelled in 1950. Ex. LLL.

2. The Viglianco note of $12,500, which was paid and released in 1951. Exs. 10, 17.

3. The Glantz note of $11,000, which was marked paid in 1951. Ex. 22.

4. The Doeber notes of $5,250, and $1,980, both receipted as having been paid in 1951 by renewal notes, which in turn were paid in cash in 1954. Ex. 24, Tr. 504-507, 535-537.

5. The Redmon note of $9,350, which was marked paid "in cash" in 1951. Ex. LL, Tr. 231-A.

6. The Reisen note of $4,500, which was assigned on July 12, 1954, to Wharton for an indebtedness of Reisen to Wharton; petitioner paid $4,500 in cash to Wharton on October 1, 1954. Wharton acknowledged under oath the receipt of this money. Ex. LLLL; Tr. 1328-1329.

7. The Glantz note of $12,000, which was paid in 1954. Ex. 24; Tr. 535-537, 557-559.

The foregoing constitute the notes which were in fact paid by petitioner and which should have been utilized in computing the cost of the properties involved. Yet the Tax Court has lumped these paid notes together with "certain" other notes that were unpaid [2] and enunciated the general principle that none of them was to be used in computing petitioner's costs.

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[2] The Tax Court apparently had in mind the unpaid $37,500 note to Florence Redelsheimer, petitioner's former wife. Petitioner offered to pay off that note as part of the property settlement with her. Tr. 754.

Therein lies the basis of the first question presented by petitioner herein, a question which requires no reassessment of the facts as found by the Tax Court and as revealed by the record.

The confusion evident on the face of the Tax Court's opinion as to the various paid and unpaid notes and its failure to discriminate between them might make it appropriate to remand the case to the Tax Court for further consideration—particularly in light of the Commissioner's refusal to justify the proposition that promissory notes that are paid should be excluded from the cost basis of property. But whatever the disposition, the fact remains that the first question set forth in the petition for certiorari is both appropriate and ripe for consideration by this Court.

The critical question at issue here is whether a taxpayer on a receipt and disbursement method of accounting who acquires property in exchange for notes which he does intend to pay and *which he in fact pays* can include those notes in his cost basis for the property. The Commissioner seemingly concedes that he can; certainly the Commissioner does not argue to the contrary. And the failure of the Tax Court and of the Fifth Circuit to recognize and apply that principle to the plain relevant facts of this case fully warrants corrective action by this Court, particularly in view of the recurring and practical nature of this tax problem.

For these reasons, supplementing those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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July 7, 1967